EXHIBIT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	)	Case No. 07-5944SC MDL No. 1917

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, March 20, 2012

Location:

JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111

Reported By: Donna J. Blum, CSR No. 11133

APPEARANCES:

HON. CHARLES A. LEGGE (RET.), Mediator & Arbitrator
JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111
415-982-5267
Email: clegge@jamsadr.com

FOR PLAINTIFFS:

R. ALEXANDER SAVERI, ATTORNEY AT LAW
GUIDO SAVERI, ATTORNEY AT LAW
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
415-217-6810
Email: guido@saveri.com
rick@saveri.com

FOR DIRECT PURCHASER PLAINTIFFS:

MICHAEL P. LEHMANN, PARTNER/ATTORNEY AT LAW
HAUSFELD, LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
415-633-1908
Email: mlehmann@hausfeldllp.com

BRUCE L. SIMON, ATTORNEY AT LAW
PEARSON, SIMON, WARSHAW, PENNY, LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
415-433-9000
Email: bsimon@pswplaw.com

FOR DEFENDANT SIMPSONS SDI:

MICHAEL W. SCARBOROUGH, ATTORNEY AT LAW
JIM McGINNIS, ATTORNEY AT LAW
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
415-434-9100
Email: mscarborough@sheppardmullin.com

APPEARANCES (CONTINUED):

FOR DEFENDANT ELECTROGRAPH:

WILLIAM A. ISAACSON, ATTORNEY AT LAW
BOIES, SCHILLER & FLEXNER, LLP
5301 Wisconsin Avenue N.W.
Washington, D.C. 20015
202-237-2727
Email: wisaacson@bsfllp.com

FOR DEFENDANTS PANASONIC:

MOLLY M. DONOVAN, ATTORNEY AT LAW
JEFFREY L. KESSLER, ATTORNEY AT LAW
DEWEY & LeBOEUF, LLP
1301 Avenue of the Americas
New York, NY 10019-6092
212-259-7394
Email: mmdonovan@dl.com

FOR DEFENDANTS SAMSUNG ELECTRONICS CORP., SAMSUNG ELECTRONICS OF AMERICA:

IAN SIMMONS, ATTORNEY AT LAW
DAVID K. ROBERTS, ATTORNEY AT LAW
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001
202-383-5300
Email: dkroberts@omm.com

FOR DEFENDANTS HITACHI:

KENT M. ROGER, ATTORNEY AT LAW
MORGAN, LEWIS & BOCKIUS, LLP
One Market, Spear Street Tower
San Francisco, CA 94105
415-442-1140
Email: kroger@morganlewis.com

I N D E X

E X H I B I T S

(none)

SAN FRANCISCO, CALIFORNIA; TUESDAY, MARCH 20, 2012

9:54 A.M.

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PROCEEDINGS

HON. CHARLES LEGGE: Okay, I guess the important parties are here. All right. Welcome.

I won't call for appearances here this morning because I think there are just a certain number of you who will do the speaking. So when you do speak, please give your identification to the court reporter, and that's all the appearances we'll note.

If at the end of the hearing you do want your appearance to be noted on the record, you can give your card to the court reporter.

I understand our two principal speakers are located here in the middle. If you want the podium, you can slide the podium down and stand and talk if it's more comfortable, or you can stay where you are in your seats.

(Phone interruption.)

(Discussion off the record.)

HON. CHARLES LEGGE: All right. Good morning. We're here in the matter of Cathode Ray Tube Antitrust litigation for the hearing on the defendants' joint motion for summary judgment.

We're not calling for appearances here, but if

you're on the telephone and wish to have your appearance noted, you can speak to the court reporter at a later time.

Now, this is a motion, and I'm turning to the proposed form of order by the defendants jointly for summary judgment against the purported direct purchaser plaintiffs who did not purchase CRTs.

This negligence has attracted a great deal of paper, and I have read your briefs. I've read some of the cases. I haven't read all of them yet. No, I've not. But I think I'm sufficiently familiar with your arguments and points to engage in a meaningful discussion.

Mr. Kessler, I assume you're going to be speaking on behalf of the defendants?

MR. KESSLER: I will, your Honor.

HON. CHARLES LEGGE: Okay, before you speak let me raise a few points with your side of the table, and that is, as I read what you're saying, what you're asking for is an order that applies to all of the plaintiffs who did not actually purchase a Cathode Ray Tube. Not a product obtaining Cathode Ray Tube but didn't purchase -- didn't purchase a Cathode Ray tube. And I think what you're looking for is what I would call a blanket order applying to all members of the claimed class and not just

to the few who were named in the -- in the complaint itself as being named plaintiffs.

And the effect I believe would really be to turn this action, a direct action, to essentially an indirect action except for the manufacturers who actually bought CRTs and maybe a few other people who bought CRT, for inventory or repair, or something like that, and that we'd be taking TV sales and monitor sales out of the case. Really that's the question. Would that have the effect of taking TV sales and monitor sales totally out of this case.

Another question is, are you asking for any relief in the direct actions? We had a voluminous brief from the direction action plaintiffs, but I don't see that your motion itself is directed at that. The motion had implications for it, yes, I'm sure it does, but I just don't know whether I consider the separate positions of the direct action plaintiffs in this particular motion.

Now, another question, and I think from your briefing you do accept the fact that Judge Illston's decisions in the LCD case are contrary to what your position is here.

And I gather from the briefing you're really not attempting to distinguish but you're just saying that she

was wrong in what she did, but in doing that and recommending that, I recommend to Judge Conti to do something different. You realize that you'll be creating a split on the substantive issue of law here in this one instance, which is rather significant. So I think as you interpret it, you're asking for really quite a lot in one motion.

But looking at the motion, it seems to me your essential point is simple. And that is that the fixed price product for purposes of this motion, I'm assuming price fixing, I'm assuming things that we don't have to repeat alleged all the time, the price fixed product in this case is a CRT, that is a Cathode Ray Tube, and it's not a product containing a CRT. And any plaintiff who didn't purchase a CRT, fixed price or not from anybody, just simply has no standing, is not a plaintiff in the case to complain about the price of CRTs.

Now, I think the point is well made and simply made, and I think that's the essence of it. The problems are if that that's true, then what about Judge Illston's decision do we just simply say it's incorrect and recommend that Judge Conti take a position that is opposed to hers and what do we do about sugar and what do we do about line report.

One other thing I think bears on this and I

can't quite put it all together, is in this stipulation and order last August concerning finished products, operative paragraph number three, that the plaintiffs withdrew their CRT finished products claims conspiracy claims provided however that the issue of the possible impact or effect of the alleged fixing of prices in CRTs on the prices of finished products shall remain in the case. I'm a little puzzled by that language comparing with this motion, and besides that, who would have the right to complain about the price of a finished product in this case.

Okay. Those are thoughts, and that explains to you or implies to you the extent of the preparation or knowledge that I have now before me. So go ahead with your presentation.

MR. KESSLER: Thank you, your Honor, and I will address each of those points in the course of my argument. Let me start out though first about the procedural context in which we face at this moment.

The motion we have filed is directed at the eight individual plaintiffs where it is undisputed that they purchased a product other than a CRT itself. We are seeking summary judgment solely against those eight plaintiffs. Your decision will obviously, on the legal issue, set a precedent within the case, but we are not

moving at this time against the DAP complaint because the time for doing that hasn't be even arisen yet. But we certainly would move against a DAP complaint on the same ground, but it is not technically before your Honor on this motion since the time to file such a motion --

HON. CHARLES LEGGE: Okay, but with respect to this case, you're not seeking a blanket order?

MR. KESSLER: I am not, your Honor.

HON. CHARLES LEGGE: Against the plaintiff class as a whole?

MR. KESSLER: No, your Honor.

HON. CHARLES LEGGE: You're seeking an order only as to the eight that are named in the complaint?

MR. KESSLER: That's all I could do procedurally because there's no class certified. The only import of your Honor's order would be to dismiss these eight plaintiffs, and, of course, it would set a precedent, you know, which obviously we would rely upon in the future either against in a motion against the DAPs, or if there was a motion to certify a class, we would obviously argue the class should not include people who did not purchase CITs because they would be indirect purchasers. And as your Honor noted, the consequence may be that the indirect purchase of plaintiffs may choose to amend their class definition to encompass people who would be

indirect. We don't know. That would be up to them, and we'd have to see what transpired.

But the -- the order we're asking you to issue, while it's very important, is actually very narrow. So that's what I would say to start out.

HON. CHARLES LEGGE: Now, wait a minute. By doing that are you implying that in any later motion you're going to have to have a factual basis as to particular plaintiffs who did or did not purchase a CRT?

MR. KESSLER: I think the way it would work out is the following, if I may, your Honor.

HON. CHARLES LEGGE: Yes.

MR. KESSLER: If you were to grant a motion, if on the DAP cases, for example, on the face of those complaints I believe they -- many of them state that they purchased only CRT televisions. If, in fact, it wasn't clear from the face of complaint, we'd probably have to do the same interrogatories, you know, or discovery that we did in this motion where it was confirmed as to whether or not they purchased any CRTs themselves.

It's possible, for example, as your Honor said, for repair purposes, even a retailer purchased, a certain number of CRTs directly from a defendant in which case for repair purposes they might be in.

So, yes, there could be factual issues, although

I think it would be very simple to resolve with an interrogatory, and we would know which is in and which is out.

With respect to the class, I think it would get resolved in the motion for class certification, though we would simply argue that the class should be limited to those in a direct purchaser case who qualifies as direct purchases, it would be purchases of CRTs.

So this would be cited as a precedent if we won this in terms of how the class should be properly defined. So I don't think --

HON. CHARLES LEGGE: Well, I'm a little confused as to what the class now is in our direct case. The definition that's been in the complaint appears in paragraph 85, all persons or entities who between certain dates that purchased a CRT product in the United States from any defendant, et cetera, et cetera.

I guess in view of the stipulation of August of '11 that we have to substitute CRT or CRT product.

MR. KESSLER: Certainly if our motion is granted, I think you would give the class counsel an opportunity to restate at some point what their class they were seeking to still represent. But you're right, at the moment the complaint is based on the original allegations of the complaint.

Also I have to correct something I said. It's nine of the 13 named direct plaintiffs who have conceded that they did not purchase a CRT. I said eight, and I just made an error about that, for which I apologize.

So --

HON. CHARLES LEGGE: Let's go back to where we have to go. For purposes of this motion and any order by me on this motion, it concerns the nine named plaintiffs who have, on the record, one way or the other, pleadings or discovery --

MR. KESSLER: Correct.

HON. CHARLES LEGGE: -- established that they did not purchase a CRT but only purchased a CRT product.

MR. KESSLER: Right. So you would be granting --

HON. CHARLES LEGGE: You have, lurking out there, the entire class. We have lurking out there the direct action plaintiffs. So whatever I or Judge Conti ends up saying about this, Judge Conti obviously being the final decider, we have to be concerned about the precedent --

MR. KESSLER: I agree with that, your Honor.

HON. CHARLES LEGGE: I appreciate that.

MR. KESSLER: What you literally would be doing is granting the summary judgment against the claims of

the nine individuals, and that would be the import of the order.

HON. CHARLES LEGGE: I appreciate that.

MR. KESSLER: So, as I said, this is important but narrow.

Let me also explain why it is narrow for a number of other reasons. First of all, we're limiting it again to the plaintiffs who there's no dispute did not purchase the price fixed product. The allegedly priced fixed product, the CRT, so that's the only named plaintiffs we are seeking to dismiss on this motion.

No. 2, and this does make this case different from some of the other cases, even different in some ways from Judge Illston's case, as I will talk in a little while. We have a stipulation here that there could be no claim under any circumstances that there was a conspiracy to fix the price with respect to the finished products.

HON. CHARLES LEGGE: Yeah.

MR. KESSLER: And I believe you could actually, if your honor is more comfortable, limit your ruling in the context of a case which has that particular stipulation in other cases, and we'll get to this. For example, I'll come back to this in Linderboard. It turns out there were direct allegations that the prices of the finished product were also subject to the price fixing

conspiracy. So you had other elements in some of these other cases that distinguished it from this particular case which makes it narrow based on facts where we know the only claim can be that the conspiracy related to the CRTs as opposed to the television or the monitors.

The next thing that I believe makes this narrow is that we believe your Honor can either take judicial notice of the fact or accept it as undisputed, because I believe it is undisputed, or follow it from your prior opinions, which note the fact that a television and a monitor is a different product, obviously, from a CRT. It's going to be whatever the market is. It's going to be a different market. I don't think there could be any dispute about that.

Obviously people who buy televisions, especially the plaintiffs here, are in a different market from manufacturers who buy CRTs or even from a retailer who buys it for the purposes of doing repairs. It's a different product in a different market that whatever it is subject to a different array of market forces, and that's going to become important. Doesn't matter what the forces are. It just matters that they're not the same.

And we know here that there's no allegation that other purchases of CRTs are in any conspiracy. So we

know we have people like HP and Dell or Apple or others who purchased CRTs for monitors who were unrelated or not in any conspiracy would be out there competing with respect to the finished product. We know that Sony television, Sharp, Visio, others would be out there competing in a different market with respect to the televisions.

So, your Honor, could take notice of the fact simply that the market forces are going to be different.

I also will note, your Honor, that the -- that it's already been stated by the plaintiffs' counsel that this would have to be an issue that would be proven in the case for them to prevail. And this isn't surprising, because Illinois Brick and Hanover Shoe are really cases under Section 4 of the clank (phonetic) net and have to do with the need for any private plaintiff to show what the impact is. You can't escape that impact requirement.

And I'm reading now from the transcript of the Rule 118 motion when your Honor was questioning counsel for plaintiff and the Court noted what if a manufacturer buys a higher priced tube but decides to absorb the increased cost itself without increasing its product. The answer of plaintiffs' counsel is then we'll find out how much of that is in discovery and we'll see what that impact is, but we don't know that now.

That's very important. We don't know that now.

The Court: That's impact, isn't it.

Plaintiffs' counsel: It is, but it's not all the impact. It may be one percent of the impact. Or it may be ten percent of the impact. Or it may be 50 percent of the impact.

The point of this, your Honor, is that that type of proof, which would actually be required under Section 4 if this case were allowed to go forward, runs head on into what Hanover Shoe said should not be done, what Illinois Brick said should not be done, what UtiliCorp said should not be done, and what the Ninth Circuit -- and this is very important, the Ninth Circuit in Delaware Valley said should not be done.

That's why when your Honor said this may create a conflict with Judge Illston, it may or may not because of the stipulation issue.

But putting that aside, Judge Illston's decision is in conflict, we believe, with Delaware Valley and has Ninth Circuit controlling law. And ultimately I think what your Honor should be recommending to Judge Conti is that Judge Conti needs to be guided by Ninth Circuit law in Delaware Valley in terms of the bright line rules of Illinois Brick and Hanover Shoe and UtiliCorp.

And the fact that you don't create case-by-case

exceptions based on specific facts of particular markets as to whether or not the policies of Illinois Brick apply or not. That that itself, that case-by-case analysis would add so much to the complexity of an antitrust litigation that what the federal courts have done through the Supreme Court and Ninth Circuit through Delaware Valley say we understand this isn't ideal, and some people who are injured may not be able to recover. But we believe this is the right result for federal antitrust laws.

And I will note from the plaintiffs' standpoint this may just make them indirect plaintiffs as opposed to direct plaintiffs. So it's not clear that, you know, that they are out or in; it's a question of where do they properly belong. Is the indirect case going to be bigger? Is the direct case going to be smaller? That's really what you're facing here.

But let me read a particular passage of Illinois Brick, because I think this goes right to our concern on pass on.

What it says, and this is on 431 US 720, and what it says is a wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact. Indeed a businessman may be

unable to state whether had one fact been different, a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example, he would have chosen a different price.

Equally difficult to determine in the real economic world rather than an economist hypothetical model is what effect a change in a company's price will have on its total sales.

Finally, costs per unit for different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to in the amount of the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff would not have or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

This goes on and on.

And what the Court is saying, we don't want the federal courts doing that, even though it may have some other impacts on other aspects of what we do under the federal antitrust laws in terms of recovery.

We would submit there is no way that plaintiffs here can go forward without having to go into precisely

that type of inquiry, and you see this in their submission when they say they want to know what percentage were related party sales, what were not related party sales. They want to explore the individual decisions that may have affected the impact. All these other facts are not relevant to this motion. They're relevant to the -- precisely the type of pass on inquiry, which Hanover Shoe --

And I'd urge your Honor to read Hanover Shoe in addition to Illinois Brick, because Illinois Brick is really focusing on Hanover Shoe. And, in fact, what I just read to you from Illinois Brick is mostly a quote from Hanover Shoe. In other words, they're taking -- the idea is that it's the Hanover Shoe principles which led to this concern about the pass on, even if it wouldn't work out exactly the way we wanted it to.

Now, the Ninth Circuit in Delaware Valley, okay, picks this up completely, and that's why I think this is very important.

What the Ninth Circuit says, and this is after UtiliCorp, the Supreme Court case we reaffirmed that we don't want to go case by case in creating exceptions to Illinois Brick. The Ninth Circuit said it's a bright line rule for Illinois Brick. And what it does is the Ninth Circuit follows what the Supreme Court did in

Utilicorp, and here is what the Ninth Circuit said.

In sum, even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, we think it is an unwarranted and counterproductive exercise to litigate a series of exceptions having stated the rule in Hanover Shoe and adhere to it in Illinois Brick. We stand by interpretation of Section 4.

Now, what that is, that's the Ninth Circuit quoting UtiliCorp in the Supreme Court and then saying that, therefore, we're not gonna look at different facts.

And now I'm looking at the Ninth Circuit decision at 523 Fed Second 1116, and what they say is that appellants fail to persuade this Court that there is anything extraordinary about the facts of this case warranting a deviation from the firmly established Illinois Brick rule.

They then point out, they make an argument as to why, you know, it would be easy to calculate the overcharge or wouldn't be a problem here or why it would serve the purposes. And this is what the Ninth Circuit says. The Supreme Court has already rejected a similar argument, see UtiliCorp, you know.

And so that's where we believe the Ninth Circuit is. That's where we believe the Supreme Court is. And

that's why we believe that's where this Court and Judge Conti should be.

Now, what do they say in response, because they do make some arguments in response to this, and your Honor raised some of this in his questioning too. So let me address that.

The first thing they say in response is, well, we don't have to prove pass-on. Okay. We could just assume pass-on. And they cite Royal Printing for this idea.

Basically you think about what they're arguing, your Honor. They're arguing is that somehow they can avoid the entire requirements of Section 4 of the Clayton Act and not show any pass-on alone. What we would say about that --

HON. CHARLES LEGGE: By pass-on, you're talking about literally passing on the higher price of the price-fixed product that became a component in the packaged product?

MR. KESSLER: Right.

They're saying, just assume that they should just be able to say we'll approve that CRT prices were increased X percent and just assume that that increase made its way into a television or a monitor regardless of market conditions, regardless of what Sony did or Sanyo

did or Sharp did, regardless of what HP did or anyone else, and regardless of the very clear stipulation. That's why I come to the stipulation which says, and we're not going to allege there was any conspiracy at all among the defendants with regard to that finished product price.

HON. CHARLES LEGGE: But in this case it's been reserved that the issue of the possible impact or effect of the alleged fixing of prices of CRTs on the finished products remains in the case?

MR. KESSLER: Yes, it remains in the case, your Honor, for now, consideration on this motion.

In other words, if we're right on this motion, okay, then Illinois Brick precludes that evidence and that proof. Okay. We're either right or we're wrong.

We obviously couldn't get them to stipulate that we're right about Illinois Brick, that Illinois Brick was not at issue in this stipulation. If we're wrong, then, yes, what they will have to do is not what they've argued, is just presume that there will be an impact, and that's -- that's what I'm getting at here. They would have to prove that impact. They'd have to prove it for each individual plaintiff. They would have to deal with that issue as a matter of class certification with respect to what that impact would be, very much like an

indirect case where those issues come up in indirect cases all the time where your Honor knows you have to prove the pass-on and whether or not it could be done on a class basis or not on a class basis, how much, and, you know, how would you do that.

Those issues will be in this case, as the stip says, unless we're right. As a matter of law, your Honor can't do it.

So I think the significance of that sentence in the stip is it means they're gonna have to prove that here, unless as a matter of law the courts have taken that inquiry away from the federal courts, that's what I believe is referenced and is the significance of the stip in that issue.

I do think it's significant because it means that it was never contemplated. They just could argue that the impact is presumed or that impact automatically follows, which is the only way I see they could get by Illinois Brick.

Now, with respect to the -- this is important, is the Ninth Circuit cases regarding umbrella damages. And the reason this is important is not because they're seeking umbrella damages. We know they're not seeking umbrella damages. The reason they're important is those cases, as do all the umbrella cases, go through the fact

that the reason the Court won't allow umbrella damages, which, your Honor, would be damages suffered from companies who were not conspirators but the idea being because someone else is conspiring, they add an umbrella so they could add a higher price.

The reason that's not allowed, the Courts say, is because Illinois Brick policy says don't allow that type of proof of -- in effect, it's another variation of pass-on in a different way. Saying, well, the non-conspirators would follow the conspiracy, and no one knows what they would do in those market forces. So they specifically cite Illinois Brick and Hanover Shoe, and they say we don't allow that type of proof because that's what would have to happen here for televisions. It's what would have to happen here for monitors.

Now, they also make the argument, your Honor, about the fact that there are a lot of sales, they claim, to either related parties or affiliated parties or the same party. I think it's mostly related parties that somehow that changes the analysis they argue, because for those related party sales, they say, well, the related party wouldn't be expected to sue because they are related and that the turns would be lost with respect to those sales. So I think we have to address that argument.

Does that argument offset the general prohibition against proving pass-on getting into these economic complexities what that would do, and our answer is it does not for several different reasons.

First of all, the Supreme Court has made it clear that the main focus here is the economic complexity, and the pass-on issues even at the expense -- and they say this in UtiliCorp, if sometimes people who were injured can't recover under the federal antitrust laws, they say that directly and completely in UtiliCorp; the Ninth Circuit says it in Delaware Valley.

No. 2, obviously there are direct purchasers who will be able to pursue and provide a direct purchase of function. Whether it's HP or Dell or Sony or Sharp or Visio, there are plenty of people who can sue to provide a deterrence function as private plaintiffs.

And, third, the consequence here may be that they move into indirect plaintiff status. It doesn't mean that the claims necessarily go away.

So it's not at all clear that there is in that deterrence factor here as well. So looking at that situation, we don't see how any concern about not having deterrence because of these particular plaintiffs may not have a direct claim anymore says let them prove pass-on, let's go in those complexities, than it does in other

cases.

I also will note the following. This related party issue is something of a -- of an illusion, and I'll explain it the following way.

If the parties are so related that they are like a division, you know, of the company and in effect they're totally under control, then there's really no economic transaction, as we pointed out. In other words, there was no CRT price to fix. I mean, think of it, for example, if it was just part of the company; if it wasn't related. Well, then, it's just there is no price internally necessarily in a division. It would just be, well, that's the cost of manufacturing. There's no fixing of a price from any Sherman Act significant. So there's nothing to deter.

If their argument is, well, wait a minute, this was a related party, you know, who is, you know, who was independent joint venture, something else, well, then, it's no different than anyone else. In other words, there's no conspiracy about the finish product prices. That related party would be expected to charge a TV price or a monitor price that would reflect the market forces it faced from its competitors with there being no conspiracy.

You would have to have exactly the very

difficult analysis that Hanover Shoe and Illinois Brick says you didn't do. Try to figure out in their head, well, how much of the price was determined by quote the price fix.

So, to me, it's one or the other. Either they're so controlled that there's no economic significance to the transaction from an antitrust standpoint, in which case there's nothing to deter, or they're sufficiently independent that, of course, without any agreement to fixed prices on the finished products, you can't just assume impact, which is what they're trying to do.

They cite Royal Printing, and what was significant in Royal Printing is that it was the same product. So basically what they ended up saying there is that, well, if it's this exact same product, says -- and Royal Printing was controlled by the defendants, in effect one of the conspirators in that case controlled them. So if it's the same product, if the price has already been increased, we'll assume it's the same price. But that's completely different when you have different products in another market with different products. And this is way beyond just saying, well, it's the same product. It's a controlled company. So assume it's -- assume it's the pass-on.

That's the fallacy for trying to rely on Royal Printing. And Royal Printing does not discuss that at all because it was the same product. It wasn't there with respect to that.

Same thing in Freeman. They cite the Freeman case. The Freeman case allowed you to go forward with respect to people who bought from a real estate association real estate services. It was the same services, just a group of competitors who formed an entity who then sold to services. And they conspired to fix whatever the prices of the services of the entity and the exact same service was passed on. There wasn't any issue of transforming a different product with different market forces.

So I don't believe either Freeman or Royal Printing is of any help to them.

HON. CHARLES LEGGE: Well, in Royal Printing don't you have a fact there that the plaintiffs actually purchased some of the price-fixed product?

MR. KESSLER: Well, they had that as well, yes. They actually purchased some of that as well. But I'm saying even to the extent there's dictor beyond that, yes, your Honor, they did have that as well, which is another distinction.

But I think to the extent Royal Printing

indicates even when they purchased a non-price fixed product says it's the same product. It's always the same product. In other words, that's the key point, your Honor. It wasn't a product in a different market. It wasn't a product with different competitors. It wasn't a product with different forces, which is what creates the problem.

What we believe of the on-point cases here are the cases we cited: Stanislaus, the tin can case versus -- the tin cans versus the tin case, which talks about the fact that had the -- there were a couple of issues in that case, but it spoke about the fact that had they purchased from a co-conspirator the cans, it would have been in different markets with different market forces.

The compressor case and the refrigerators where they said you can't -- and in that case specifically refused to follow Linderboard and Sugar, in specific. I'm going to talk about those cases. And they said that's not the law of the Sixth Circuit, for example. That's the case said in compressors, which is where that case was. Same as is not the law of the Ninth Circuit in our view with respect to Linderboard and Sugar.

And they said you can't sue just for buying a compressor and just buying a refrigerator as opposed to buying a compressor. The same right here in this

district when your Honor says, well, there's a conflict in the district. Well, right here in the ODD case, okay, we believe the decision in ODD indicated you couldn't just buy an ODD device as opposed to an ODD on exactly this issue. And it's dismissed.

Now there's no motions to dismiss pending an ODD again. There's another round of briefing, and there will be another round of decisions. But in the existing decision in ODD the Court did not have a problem with saying you've got to buy the ODD not buy the ODD devices even though in that case there was an allegation that there was an ODD conspiracy, just like there was originally in this case. But what the Court did was dismissed it under Trombley (phonetic) for not being sufficiently well pled with respect to that.
That was the import of that series of ODD rulings.

So we think the cases that have looked at this other than Judge Illston here have, in fact, you know, not felt that they suggested, nor this transformation.

Now, one of the things the plaintiff may say, well, CRT is a big part of the television, and they may argue that we think it would have had an impact here. Well, maybe they're right; maybe they're wrong. But that's what UtiliCorp and Delaware Valley say you don't do. In other words, you don't do a case-by-case factual

analysis to say, well, in this case was there pass-on or not pass-on. It was that's not the issue before your Honor. Maybe they could prove pass-on. Maybe they couldn't prove pass-on. Okay, that's not the point.

The point is you're not supposed to have a trial on the issue of the pass-ons. So the fact that -- and this shows why you can't presume it just presume it.

Look for example at the refrigerator case. So in the refrigerator compressor case, the compressors are a very small part of the refrigerator. It's a small part. It -- it could be a $2000 refrigerator, $30 compressor. Very, very small part. And the point of that is you don't do a case-by-case analysis. So you couldn't have a rule that said as they argue, well, if you bought from a related party, just assume the impact went down. How would you ever do that in a refrigerator. You'd assume if a compressor went up two dollars, it affected a $2000 refrigerator? You would never make that assumption. They would have to prove it.

Now, they would say it's easier to prove it over here for televisions. That's not the point. The point here is that we don't go through. That's what Illinois Brick, UtiliCorp, Delaware Valley say. You don't go by case by case trying to prove in this case I can't show the pass-on, in this case I can't show the pass-on, in

this case it's easy, in this case it's hard.

What the Ninth Circuit said is bright line rule. Now, that brings me to Sugar, Linerboard, and Judge Illston's decision.

So why do we say your Honor should not follow Judge Illston. Judge Illston, in all due respect for Judge Illston, did not discuss any of these issues. You should follow Judge Illston's decision if it's persuasive. It's not binding obviously. It's a sister-court decision, but it's not binding on Judge Conti any more than the decision in ODD is binding on Judge Conti, which is also in the northern district.

What is binding on Judge Conti is Delaware Valley or UtiliCorp or Illinois Brick or Hanover Shoe. That clearly is binding on Judge Conti with respect to that.

So with respect to Judge Illston's decision, it's really a question, is it persuasive. When you look at Judge Illston's decision, with all due respect, there's no analysis of these issues. She doesn't consider at any length this issue of different markets, different competitors, transformed products. How do you address those issues. She just doesn't consider it.

No. 2, she cites, I believe, Linderboard and Sugar, but she doesn't explain why she thinks that

overcomes Delaware Valley. She doesn't discuss Delaware Valley. She doesn't discuss the bright line rule. There's just no persuasive analysis, I believe, to convince this Court that it makes sense for the Ninth Circuit to adopt that type of a ruling.

The plaintiffs have also argued that Judge Conti somehow adopted this in his opinion accepting your recommendation decision. Your Honor, I believe you know that at the time of that decision, none of these issues were squarely presented to Judge Conti, because he did that in the context of your Honor's decision, which pointed out that they were alleging a conspiracy for finished the products at the time.

He does cite, you know, in one short paragraph he does cite, I believe, either Linerboard or Sugar, maybe both, I think it was Linerboard. But I also will note he doesn't even discuss Illinois Brick in that paragraph, or Hanover Shoe.

So I don't think Judge Conti has in any way thought over the issues in this context, because when your Honor ruled, they were not before your Honor in that context, and your Honor didn't give them any recommendations with respect to that context. So I don't think that is in any way --

I think this is an open issue in this case

certainly regarding that.

So that gets us to Sugar and Linerboard. What I would say is the following: Sugar, okay, specifically acknowledges that it was saying, well, let's -- let the plaintiffs prove how much impact there was. And they say it could be difficult in some cases, could be easier in other cases. That's the Sugar analysis.

Frankly, there's no way to square that with Utah. Utah came later as a Supreme Court case. I don't think there's any way to square with Illinois Brick and Hanover Shoe, but there's certainly no way to square that with Utah regarding that or Delaware Valley.

That leaves Linerboard, which was after Utah. And what I would say about Linerboard is it can't be overlooked the fact that Linerboard had allegations of a conspiracy regarding the finished products as well. It was in the record that went up to the court of appeals. Okay. There's no -- there could be no dispute about it. That's what's discussed in the district court decision that was being appealed, and that puts it in a different context. So, again, they didn't have to face the very unique -- uniquely difficult issue that your Honor faces where you have a stipulation that precludes any conspiracy about that, where you have a different product where it's there. And we would respectfully suggest that

the Ninth Circuit after Delaware Valley would not follow Linerboard to the extent it was meant to apply where there's not an allegation of conspiracy if it's meant to apply to that, and it certainly wouldn't follow Sugar which is directly opposed.

Finally, your Honor, I just will conclude with two things. One, plaintiffs make a 56(b) argument. I'm not going to spend much time on that except to note all of their facts they want to discover have nothing to do with this issue that I'm arguing. What it has to do with some of the type of facts that they would need to prove pass-on which we are arguing are precluded by the Supreme Court and Ninth Circuit from considering. There is no dispute about the only facts that are relevant here, and, therefore, your Honor, they made no 56(b) showing, and the --

HON. CHARLES LEGGE: And the fact you consider important is that they did not purchase a CRT from anybody?

MR. KESSLER: That's the only -- the only fact.

HON. CHARLES LEGGE: You think that's the only fact you need?

MR. KESSLER: Oh, and one more other thing that I don't think is in dispute that a CRT is not a television. They're in different markets. I don't think

that would be disputed about that --

HON. CHARLES LEGGE: Well, in this case I don't think I need to make a factual inquiry at all of that issue.

MR. KESSLER: I believe that's correct, your Honor.

And that leaves me finally, your Honor, I would just close with the following quote from UtiliCorp, and this is on page 497 US. He -- I guess I can't do it that way. Page 216, your Honor, what it says in the following, the proceeding conclusions bring us to a broader point.

HON. CHARLES LEGGE: Hang on a minute. Let me follow you.

MR. KESSLER: It's 216 of UtiliCorp under D, there's a heading D.

HON. CHARLES LEGGE: Yeah. Here we are Hanover Shoe and --

MR. KESSLER: It says the -- the rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in automatic cases.

That's basically what plaintiffs are arguing here. It doesn't apply here. We, nonetheless, believe that ample justification exists for our stated decision not to carve out exceptions to the direct purchaser rule

for particular types of markets, the possibility of allowing an exception even in rather meritorious circumstances would undermine the rule. And then the last paragraph of D in sum even assuming that any --

HON. CHARLES LEGGE: Wait a minute.

MR. KESSLER: This is after the quote, your Honor, just before point four.

HON. CHARLES LEGGE: Okay.

MR. KESSLER: In sum, even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, which is basically what they're arguing here, we think it is unwarranted and counter productive exercise to litigate a series of exceptions.

Your Honor, I would suggest that is the guiding principle for this motion, and we respectfully urge you to grant this which would have the effect of changing eventually, as your Honor noted, the character of this case so that it could go forward now knowing who are the directs are, who might be the indirects, where people fit, how classes should be looked at or not, which is one of the reasons we believe it's so important to dissolve this issue now because the worse issue from the standpoint of case administration would be to proceed way down the road in this case only to find out that the

classes, both the direct and indirect classes, you know, have to be very different than the way in which the litigation is preceding based on the allegations in the complaint.

Thank you, your Honor.

HON. CHARLES LEGGE: So you do recognize that if we're -- if I were to adopt your position and if Judge Conti were to adopt your position, that we really would be shifting a lot of the directs to the indirect category.

MR. KESSLER: If they chose they would have to redefine that class. But, yes, they would have the option of redefining that class to include all those. I think that's correct.

HON. CHARLES LEGGE: And in the present direct case, damages, causation based upon TV sales, prices, or monitor sales is out of the case.

MR. KESSLER: As a matter of law, the inquiry would be precluded, is the way I would say it.

HON. CHARLES LEGGE: All right. I understand.

MR. KESSLER: Okay.

HON. CHARLES LEGGE: Okay. Let's take a ten minute recess.

(Break taken.)

HON. CHARLES LEGGE: All right. Let's go back

on the record and hear next from plaintiffs' counsel.

You're going to be arguing.

MR. LEHMANN: Yes, your Honor.

Michael Lehmann on behalf of Housfeld, LLP.

We've divided up the matter in the following manner. I just want to apprise your Honor.

HON. CHARLES LEGGE: Sure.

MR. LEHMANN: I represent the direct purchaser class, and I will be arguing the legal points.

Mr. William Isaacson of Boies, Schiller will be arguing be arguing the points with respect to direct purchasing plaintiffs.

And Mr. Rick Saveri will be arguing his points raised in the Rule 56(d) declaration.

HON. CHARLES LEGGE: All right. Now, to start out do you contest that these eight or nine plaintiffs did not purchase a CRT.

MR. LEHMANN: Your Honor, I am unaware of any facts that would indicate that they purchased CRTs.

HON. CHARLES LEGGE: Okay.

MR. LEHMANN: As opposed to finished products.

HON. CHARLES LEGGE: So really then your position is that even though with what they purchased was not a CRT because the product of which the CRT is a component that under the various cases you're citing that

is an understanding.

MR. LEHMANN: Our position is that where you're in a situation where defendants manufacture a price-fixed component and incorporate that component in a finished product that they make and sell.

Plaintiff who only bought the finished product from either the defendant itself or from a subsidiary or division of the defendant has standing to sue for damages under the Clayton Act for the conspiracy to fix the component.

HON. CHARLES LEGGE: Okay. Now I'm not sure whether you qualified your response. What if it's purchased through a third channel, a third source? Suppose the manufacturing defendant puts the price-fixed product in his own TVs, TVs he's selling and sells to a wholesaler.

MR. LEHMANN: Your Honor, if it's a situation where the manufacturer sells to totally independent third party, like a wholesaler, and that wholesaler in turn sells to a member of an ultimate consumer or a retailer, we would not contend that those purchases are within the direct purchaser class.

HON. CHARLES LEGGE: All right. So your -- your group is a purchaser from a defendant?

MR. LEHMANN: Right.

HON. CHARLES LEGGE: Or some subdivision.

MR. LEHMANN: Correct.

HON. CHARLES LEGGE: Or something of other of the defendant.

Okay. Go ahead. Thank you.

MR. LEHMANN: So, your Honor, given that conceptual framework, I mean, the question I ask myself is why are we here arguing this motion today.

It's the direct purchase plaintiff's belief that this issue has already been raised and decided by Judge Conti. And let me explain why the principals of Linerboard was argued to your Honor in opposing the various motions to dismiss back in August of 2009.

They were also argued to Judge Conti in the appeal from your Honor's report and recommendation in a belief that the direct purchasers filed in February of 2010. In that brief they cited Linerboard. They also quoted Sugar.

Now, your Honor, as defense counsel correctly noted, did not discuss Linerboard in your recommended decision. But Judge Conti did in his March 2010 opinion. And I've highlighted for your Honor's benefit the portion of the opinion that we rely on.

HON. CHARLES LEGGE: I've got it in its typewritten form here.

MR. LEHMANN: What Judge Conti -- this is his opinion affirming your decision denying the various motions to dismiss. And what he said, and I'm quoting, furthermore courts have found antitrust standing where plaintiffs purchased downstream goods from manufacturers who made an allegedly fix the price of a component of those goods, and then he proceeded to site and summarize the Linerboard opinion.

In your Honor's recommended decision on Rule 11, you specifically noted that the complaint could be read to allege that a conspiracy as to CRTs had an impact or effect on finished products prices and that discovery as to that impact or effect was appropriate.

And I would refer your Honor to page 14 of your opinion, wooing and recommendation with respect to Rule 11. Again, I've highlighted --

HON. CHARLES LEGGE: Wait a minute. I've got mine here. It's the one June of '11. Right?

MR. LEHMANN: Is your recommended decision on docket No. 947.

HON. CHARLES LEGGE: Yes. What are you citing then please?

MR. LEHMANN: I'm citing page 14 where your Honor indicates that your Rule 11 determination would not remove finished products from the case in their entirety

but would -- there could still be limited discovery allowed with respect to the issue of how the conspiracy as to CRTs affected the prices of finished products.

As we noted in our brief in the May 2011 Rule 11 hearing, defense counsel said -- and we quoted this in our brief, it's in the transcript of the May 26, 2011, hearing at 109 to 110.

In LCD they argued impact, okay, and they argue that under the Sugar Linerboard cases they have standing to sue for that. Okay. Counsel goes on. Okay. So that should be doing asserting what they asserted in LCD.

Well, that's exactly what we did in the stipulation that we eventually entered into.

The stipulation resolving the Rule 11 issues specifically stated, quote, the issue of the possible impact of effect or affect of the alleged fixing of prices of CRTs on the prices of finished product shall remain in the case. Clearly, if we thought by entering into that stipulation the issues of finished products had been eliminated from the case, why would we be stipulating to allow for further discovery with respect to such finished products.

Now, as I said defense counsel cited the LCD case in the argument on the Rule 11 hearing. In LCDs Judge Susan Illston, whose opinions in this case your

Honor has followed before, twice adopted the principles of Sugar and Linerboard. She did so the first time in denying a motion to dismiss for lack of standing with respect to monitors and television containing LCD panels.

HON. CHARLES LEGGE: I've got four decisions put together here.

MR. LEHMANN: The one I'm referring to, your Honor, is 2008. It's 586 fed sub second 1109 at pages 1118 and 1119.

HON. CHARLES LEGGE: Yes.

MR. LEHMANN: And then in a second decision on class certification she again endorsed the principles of Sugar and Linerboard and certified --

HON. CHARLES LEGGE: That's the one.

MR. LEHMANN: That opinion is 267.

HON. CHARLES LEGGE: FRD.

MR. LEHMANN: FRD 291 at pages 206 and 07. He certified direct purchaser plaintiff classes of purchases of LCD panels and of purchasers of monitors, television or mobile computers containing LCD panels. In the recent LCD criminal trial against AU Electronics, Judge Illston instructed the jury that the elements of defense --

HON. CHARLES LEGGE: I don't have it.

MR. LEHMANN: You don't have it because it occurred just very recently.

That the elements of the offense included fixing the price of TTFT LCD panels that were incorporated into finished products such as notebooks computers, desk top computers, and televisions.

So we find ourselves in the situation where we were told by the defendants, hey, why aren't you doing what you did in LCDs. We proceeded by the stipulation to do exactly that, and now we're told by the defendants, hey, LCDs is not the law. Other judges had disagreed.

They site the opinion of Judge Richard Seaboard (phonetic) in the optical disk drive litigation. Judge Seaborg there was concerned about the situation where he perceived to be a conspiracy claim with respect to ODD devices, finished products containing ODDs that were sold by Dell and HP. Wholesalers who were outside the conspiracy.

But here's what he said with respect to Judge Illston's opinion in LCDs. Quote, plaintiffs in this case do not have a standing problem with respect to any ODD devices they may have purchased directly from defendants.

That's us. We're only arguing for devices, finished product purchased directly from the defendants. Not from HP. Not from Dell. Not from any third party that's unaffiliated with the defendants.

So what have we got here. Your Honor. In short, the article three judge presiding over this case has stated unequivocally that Linerboard is applicable here.

Your Honor viewed the issue of impact and effect on finished products and said it wasn't affected by a Rule 11 recommendation and that discovery could proceed with respect to that impact.

The stipulation among the parties was -- simply preserves the issue, and counsel for the defense said that the DPPs should be following what was done in LCDs, which was precisely what we did.

That's the overview. Let's step back and talk a little bit about some of their cases.

Illinois Brick. It's important to consider the fact situation in Illinois Brick. In Illinois Brick you had allegations of a conspiracy by manufacturers of concrete block to fix the prices of such block. Those companies sold to independent third-party masonry contractors who then resold them to independent third-party general contractors who prepared bids for construction projects that they then submitted to plaintiffs like the State of Illinois.

So the case involved one product, a four-step distribution change, where the two middle steps of the

chain were neither owned or controlled by any defendant and were not accused of conspiring with any defendant.

The Court held that Illinois, the one who got the bid, couldn't sue for damages under the Clayton Act. Its reasoning was actually based on two factors. The first was concern about multiple liability by different groups of purchasers. And I should note in passing this concern has been somewhat modified by the fact that the US Supreme Court subsequently ruled that the states could enact Illinois Brick repeating loss that afforded a damage action to indirect purchasers to buy from our cartel. So you can have a situation now where both the direct purchasers and the indirect purchasers can sue for damages and there is no defense that the direct purchasers passed on the overcharge down the distribution chain.

The second concern as defendants note is that there might be some evidentiary complexities caused by offensive use of pass-on by a plaintiff several steps removed in the chain of distribution.

If you look at the cases that have been decided after Illinois Brick, particularly the cases that we sight -- Royal Printing, Sugar, Linderboard -- those cases are not really focused so much on exceptions to Illinois Brick as they are focused on identifying which

plaintiff, outside the conspiracy, bought the price-fixed product in the first instance and suffered injury and, therefore, should obtain recovery. Let me explain this a little further.

Let me first take the example of Royal Printing. And, again, Mr. Kessler is entirely correct, that case involved a single product; that wasn't a case of a component product and the finished product. But the analysis of deterrents that the Ninth Circuit engaged in in Royal Printing is fairly significant and I think ties in with the analysis you see in Sugar and in Linerboard.

There you had a situation where the plaintiff bought paper from a division of one defendant and the subsidiary of other defendant. So you had this question, well, you had this internal transfer price between the manufacturer and either the subsidiary or the division, how do you know how much of the over charge was passed on.

The Ninth Circuit in Royal Printing acknowledged that that was a potential issue, but what it said was this, and I'm quoting at 621 Fed 2nd at 327. The only alternatives are to allow royal printing to sue the appellees for the entire amount of the overcharge to the wholesalers or not to allow Royal Printing to sue the appellees at all.

Because, as we have already shown, as a practical matter the direct purchasers here will never sue, in this context they were talking about the subdivision and the subsidiary, borrowing Royal Printing suit would close off every avenue for private enforcement in the antitrust laws. This would be intolerable.

The Ninth Circuit went on to say that Royal Printing could recover the full overcharge on its purchase of the price-fixed products from the defendant. On the same page of the opinion it said, quote, Hanover Shoe teaches that in such situations there's nothing wrong with the plaintiff winning a windfall gain so long as the antitrust laws are vindicated and the defendant does not suffer multiple liability.

And I note this analysis of Royal Printing has been followed the Ninth Circuit as recently as 2008 in Delaware Valley.

Now, Judge Illston in LCDs said, this deterrence analysis in Royal Printing is really not all that different from the deterrence analysis that the third circuit undertook in Sugar and Linderboard. She said that in her opinion in November 7, 2011, opinion in the TFT LCD cases 2011 west law 5357906.

In both Sugar and Linderboard, the conspiracy focused on a complete product. In each case the named

plaintiff bought a finished product, candy and sugar, corrugated sheets in containers in Linerboard, either directly or from a defendant or through a subsidiary. In each case the claim was that the conspiracy as to the component was said to have the intended affect of raising the price of finished products.

Now, the defendants in their brief, and it's been repeated here today, said that, well, Linerboard is distinguishable because there the conspiracy covered both the component and the finished product. And they cite some language from the District Courts' 2001 opinion in Linerboard.

We went back and looked at that language and they had a little ellipsis in the middle of their quote, and I'm going to tell you what was missing. This is from In re Linerboard antitrust litigation, 203 FRD 197 203.

The Court said that the allegations of the case were grounded on allegations -- quote, grounded on allegations that defendants conspired to restrict the output of Linderboard -- here comes the missing part -- in order to support increases in the price of Linerboard. And then we go back to the text, with the objective of increasing the price of corrugated sheets and corrugated boxes.

We contend the same thing. We contend there was

a conspiracy to fix the prices of CRTs, and one of the objectives there was that it had the effect of increasing the prices of finished products by the amount of the embedded overcharge.

And I note Judge Conti in this case, in the opinion I gave to you, viewed Linerboard as a case involving price fixing conspiracy with respect to Linerboard.

So taking Sugar, which I think is the initial opinion from the third circuit that addressed this topic, there again, the concern was expressed by the defendants in that case that if you had a situation where you tried to trace the overcharge from the sugar into the candy through potential multiple levels of distribution, you might have additional complications.

The third circuit responded, however, this must not be allowed to obscure the fact that the plaintiff did purchase directly from the alleged violator.

True. The price-fixed commodity had been combined with other ingredients to form a different product. But such as a sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers.

It pointed out that the situation it had before it was analogous to a situation that could have happened

in Illinois Brick where you had the general contractor conspiring with the makers of the concrete block. And in that kind of a situation the third circuit said the concern which the Supreme Court expressed about the proration of overcharge among the number of entities in the chain would not have been threatened.

The third circuit went on to talk about the deterrence aspect in ways very similar to the way that the Ninth Circuit said about Royal Printing. Here's what the third circuit said. I'm quoting from 579 fed 2nd at pages 17, 18.

We are also influenced by the realization that to deny recovery in this instance would leave a gaping hole in the administration of the antitrust laws. It would allow the price fixing of a basis commodity to escape the reach of a treble damaged penalty simply by incorporating the tainted element into another product. That's the refinery who illegally set the price of sugar could shield itself by putting all of the sugar into a new product, syrup, simply by adding water and perhaps a little flavoring.

We do not think the antitrust laws could be so easily evaded.

As the Court went on in Sugar to note, there would be no allocation problems in the circumstance

before it. Quote, plaintiff is a direct purchaser and, therefore, entitled to recover the full amount of the overcharge.

As we pointed out in our briefs, Sugar and Linerboard have been cited on this point with approbation or at least followed in seven cases as recently as 2010. Those cases include LCDs one and two. And as you see Judge Conti endorsed Linerboard in his opinion in this case.

Now, in the LCDs cases, Judge Illston specifically relied on this deterrence rationale that's expressed in Sugar. 405 million dollars in settlements have been paid so far to resolve direct purchaser complainant components finished product claims in LCD. And Toshiba, one of the defendants here, is going to trial in the next month or two on both sets of claims.

And, your Honor, it makes absolutely no sense to say that the direct purchaser plaintiffs in LCDs have standing to sue for overcharges in both LCD panels and monitors, televisions and laptops, but DPT's in this case have standing to sue in this case only with respect to CRTs and can't make any kind of claim with respect to the monitors and TVs that incorporate CRTs and are sold by the defendants.

We talked about the fact in our brief that we

believe that, although discovery is far from complete in this topic, that perhaps as much as 60, 70, 80 percent of CRTs are sold in subsidiaries or affiliated companies who then incorporate them into TVs or monitors.

It's clear that you can't expect those subsidiaries or fellow defendants or divisions to sue their parents or coconspirators during this entire class period March 1, 1995, November 25, 2007, no coconspirator or subsidiary coconspirator has sued a co-conspirator or parent entity with respect to the allegations of this conspiracy.

Under defendants' theory of the case, these sales, the ones that do these divisions, codefendants, subsidiaries, there will be no direct purchaser who can recover with respect to that. Judge Illston and LCDs refuse to count such a result. Your Honor should resist the temptation and invitation to be the first jurist in this district to take an opposite view. And you ought to especially resist it because Judge Conti has aligned himself with Judge Illston on this topic. His language following Linerboard was an independent affirmative ground to deny the motions to dismiss.

Now, the defendants also talk in their brief and in their argument today about the fact that the federal antitrust laws really shouldn't be concerned with

intra-company transfers because they have no external competitive significance, to which I say wrong. That argument ignores the fact that the record to date shows that defendants at the glass meetings strove to ensure that the fixed CRT prices charged to third-party affiliates, third-party entities, finished product makers, were also charged to subsidiaries or affiliates of defendants.

The defendants clearly did not think these inter-company sales were irrelevant or significant. They wanted to make sure the prices were the same in both directions so the intra-corporate sales wouldn't undermine the CRT conspiracy.

I want to talk a little bit about some of the cases that defendant cite to support their position. They site two case. It's UtiliCorp and Delaware Valley that do not involve finished products. They cite three other cases that do involve component products and finished products, ODDs, the optical disk drive case, Stanislaus Food Products versus Costco, and the refrigerator compressor antitrust litigation. All of these latter three cases are distinguishable because the finished products were purchased from a non-defendant.

In UtiliCorp you had a situation where several states filed antitrust suits on behalf of their residents

accusing national gas producers of conspiring to infiltrate the price for gas, for utilities. The Supreme Court had this to say, quote, and I'm quoting from 497 US at 207, the consumers in this case have the status of indirect purchasers. In the distribution chain they are not the immediate buyers from the alleged antitrust violators. They bought their gas from utilities, not from the suppliers said to have conspired to have fixed the price of gas.

That's the difference between that case and ours.

In Delaware Valley various plaintiffs including Bamberg County Memorial Nursing and Hospital Center challenged Johnson & Johnson selling sutures and endomechanical products as an unlawful.

Bamberg didn't buy the products directly from Johnson & Johnson. It rather dealt solely with an independent third-party distributor named Owens and Meyer nor controlled by J&J nor alleged to be a conspirator.

The Ninth Circuit deemed the Illinois Brick bar applicable on their facts. But those aren't our facts.

Defendants claim that Delaware Valley created a bright line rule with respect to the finished product component product situation. No. No where does Delaware Valley address that situation, and nowhere does it state

such a rule.

ODDs, I've already said that Judge Seaborg in ODDs agreed with us in this situation where you're talking about purchases from a defendant with respect to devices that contain as a component of price-fixed product. His concern, as I say, was that he viewed the plaintiff in this case as covering situations where the purchases might be from non-defendant third parties like Hewlett Packard and Dell. And he said, once again, the problem --

I'm quoting from 2011 West Law 38944376, et cetera.

Once again, the problem is that plaintiffs are attempting to extend the price-fixing conspiracy to finished products not produced by the defendants, An issue not expressly addressed in Cathode Ray.

Well, that's not our case. We're limiting it here to the purchases from the defendants with respect to CRT -- price-fixed CRTs contained in the finished products that they sell. Not that Circuit City sells. Not that Dell sells. Not that HP sells. That's the indirect purchaser case. We're talking about purchasers directly from the defendant.

In Costco the district court held that purchasers of tin cans lacked standing to sue for alleged

conspiracy involving the prices of tin mill products, steel sheets coated with tin, which undergo multiple production processes before contained.

The opinion has no discussion of Sugar or Linerboard, no discussion of any of the opinions in LCDs. The case is distinguishable because there the plaintiff bought from a non-defendant who was alleged to be dealing vertically with the other defendants.

The case is also distinguishable because we contend here that when you put a CRT into a television, you're not talking about multiple production steps that change its character. The CRT basically remains insignificantly changed when it's incorporated into the product.

And that brings us to the compressor case. This is the one reported decision that defendants have managed to dredge up that questions whether Sugar and Linerboard should be followed. It's distinguishable, and it also has language that supports our position.

There you had a situation where it was alleged that manufacturers of refrigerant compressors fixed the prices for those products. Some of those manufacturers also produced refrigerators and sold them from the price-fixed compressors. The issue was whether the plaintiffs who bought only the refrigerators had standing

to sue under the Clayton Act.

The District Court took the view that it was not required to follow Sugar. The District Court also noted, however, in its view, that Sugar might not run afoul of Illinois Brick.

Here's what it said. Under those unique circumstances, there is no pass-on theory in play. In the situation presented In re Sugar, the plaintiff asserting antitrust injury does not allege an offensive pass-on theory at all, because the defendant at issue made both the price-fixed product, sugar, and the finished product containing the price-fixed product, candy, and thus there was no middleman.

In other words, Stotter (phonetic), the plaintiff in Sugar, was not asserting was not asserting a pass-on theory because the defendant violated that sold the candy also manufactured the price-fixed sugar. And, therefore, there was no middleman and thus no issue as to whether or not that middleman absorbed the overcharge for the sugar.

I am quoting here from 795 Fed sub second and pages 657 and 658.

The Court in the compressor case went on to note at page 658 that no plaintiff had alleged that it bought from a defendant any refrigerator containing an alleged

price-fixed compressor. As I say, that's different from this case as well.

We've also raised in our brief and argument that defendants' motion is procedurally deficient because they haven't provided facts on what we think are contested issues. And the types of facts we're talking about have been outlined in our brief, but to give you an example, defendants assert that the market for finished products is different from the market for CRT and materials in complex ways. We contend that although they might be distinct markets, they are inextricably intertwined, and the price of the CRT that's a component into the finished product, has a definite effect on the finished products price.

Defendants also assert that plaintiffs did not purchase finished products from a controlled independent mediary.

We contend that they did purchase from controlled intermediaries --

HON. CHARLES LEGGE: If they didn't buy CRT at all, what difference does that make?

MR. LEHMANN: I'm reading to you what they said. This is an issue they raised.

So they've raised the issue of controlled intermediaries. They assert that CRTs in the finished

products were plaintiffs that -- they assert that the CRTs in the products that the plaintiffs bought were substantially altered, and that relates back to the issue in the Costco case where the Court viewed it as kind of important about whether or not the component was substantially altered on its way to be included in the finished product.

We think that presents a factual issue.

They also assert that entities such as Hewlett Packard or Dell or others purchased CRTs directly from one of the defendants. There's no record to support there. Maybe that's true. I assume it would be. But the fact of the matter is I don't think they've established it for purchases of summary judgment.

And so we think that each of these assertions which defendants are relying on as a factual matter in their motion needs support. And their answer is, well, it's undisputed. Well, you can take judicial notice of it. Well, what are they giving you to take judicial notice of? This is a complex interaction between two markets. You've got no record to rule on.

HON. CHARLES LEGGE: The issue is whether a person, company who did not buy a CRT has standing to sue in this case where the allegation is price fixing of the CRT.

MR. LEHMANN: That's right.

HON. CHARLES LEGGE: I don't think any of those facts are necessary for that kind of decision. That's a pure question of law.

MR. LEHMANN: I think it's a mixed question of law in fact that I would agree with your Honor that it's predominantly a legal question. Certainly the question of whether the Courts in this district and circuit follow Sugar and Linerboard is a legal question.

HON. CHARLES LEGGE: Okay.

MR. LEHMANN: I'm finished, your Honor.

HON. CHARLES LEGGE: Okay.

MR. LEHMANN: And I'll turn the floor over to Mr. Isaacson.

HON. CHARLES LEGGE: Okay, sir.

MR. ISAACSON: Thank you, your Honor, for hearing from us.

As your Honor has said, that while the order today doesn't technically imply to the direct action purchasers, the effect of the order as a precedent, if adopted and sustained, would drive a hole through our cases and preclude the federal claims of many of the direct action purchases and preclude the federal claims for large parts of other purchases.

And to just pick up where you last spoke, your

Honor, is the issue here is did a person who did not buy a CRT have standing. And I think the more precise question is, did a person who did not buy a CRT alone have standing. Because there is no issue that direct purchasers of televisions and monitors from a conspiracy or from conspirators or their controlled affiliates are direct purchases. They directly purchased both the finished product and all of the components. They are also the only direct purchasers of those CRTs and finished products.

There's the conspiracy. There's the purchaser. What is purchased is a television or monitor that includes components, perhaps the most important of which is the CRT. There's no -- there's no question that that is a direct purchase.

From the very beginning of when this issue was first raised in the Sugar/Linerboard case, in the Sugar case the Third Circuit explained that. And this is at 17, that decision. I've also took the chance to just summarize the points I want to make on three pages that I want to leave with you.

And the Court in Sugar explained what is self-evident, that we have standing because we directly purchased CRTs from members of a price-fixing conspiracy or from their own on controlled affiliates.

And the Court in Sugar explained at 579 F 2d at 17, as the defendants here point out, the product which plaintiff purchased is not with sugar but with other candy, more than one ingredient in terms of the product.

So you'll remember the sugar case involved putting sugar in candy. And they made the same argument. Defendants made the same argument Mr. Kessler makes here, that a television would have different consideration than candy.

To the extent there will be some additional complications underlying the damage claims, however, this must not be allowed to obscure the fact that the plaintiff did purchase directly from the alleged violator.

It goes on to say the concern which the Supreme Court in Illinois Brick expressed about the proration of overcharge among a number of entities in the chain would not have been present, nor is that problem of allocation amongst various distributors present in this case.

Plaintiff is a direct purchaser and, therefore, entitled to recover the full extent of the overcharge.

When Illinois Brick or Delaware Valley is talking about when are we going to permit exceptions to the direct purchaser rule, that's not what we're talking about here. We are direct purchasers.

The defense argument is that there's still some complications in showing the price -- effect on the price of a price-fixed component. That is not a complication or pass-through analysis that is discussed in Illinois Brick or UtiliCorp or those lines of cases.

Where you have a direct purchaser instead the Supreme Court has said -- that in all of the other decisions that Mr. Lehmann just talked to you about, said there the direct purchaser recovers the full overcharge. If there are complexities in demonstrating that overcharge, such as it was -- that the price fix was on a 50 percent component, that is different and does not matter and does not make Illinois Brick applicable.

Mr. Lehmann just read to you language from the compressors case. The only Court that questioned Sugar, though it does not reject it, that says no, we're not talking about pass-through analysis when we're talking about this.

So when defendants are arguing that complexities in analysis are a reason for denying standing, they are doing it based on this component principle, and they're making that argument even if the CRTs are an important part of the product, 50 percent of the product, 75 percent of the product, 90 percent of the product. It would not matter. You would still knock out a federal

claim of a direct purchaser.

Mr. Lehmann also -- Mr. Kessler, even to make this argument, expressed to you that it would be okay to price fix a cost of manufacturing. That's just an internal price. A horizontal conspiracy to fix the price of a key component of a product creates a federal claim for direct purchases and its also a per se violation of the antitrust laws.

That was the instruction to the jury that Mr. Lehmann just read to you from the AUO case.

They're not just trying to drive a truck through direct purchaser law. They're also questioning the whole underpinning of antitrust liability for a conspiracy that would jeopardize the other cases that are going on the civil side and would be grounds to question the jury instructions that are being given in these cases.

If conspirators agree to fix 50 percent of a product, the direct purchaser has standing to bring a claim. That is not a pass-through analysis through multiple channels of distribution, that that's -- that which is the issue of Illinois Brick. It is entirely different analysis. Does not matter whether it's complex.

The Supreme Court in Illinois Brick did not say, well, if there's complex analysis, we're not going to

allow an antitrust claim. They spoke about the complexities through multiple channels of distribution and the difficulties, therefore, of allocating damages amongst all those different channels because you would have this group saying, well, we think we got 25 percent of the cost and the other group saying, no, we have 50 percent and how are you going to be able to globally do that. How are you going to apportion the claim.

That apportionment does not happen here, because we are the direct purchasers entitled to the full overcharge. And that apportionment is the key to the Illinois Brick decision and the complexities that Mr. Kessler raises in his argument.

When he read from Illinois Brick, Illinois Brick goes on to say, we understand Hanover Shoe has rested on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

That issue does not come up with a direct purchaser of a finished product, a component of which was subject to price fixing. We are the direct purchaser of the full product and of its components.

No other plaintiff is going to have standing to bring that federal claim. Apple, HP did not buy directly the CRTs in our finished goods. We bought them. We bought them from conspirators, and we bought them from their controlled affiliates. No one else has that federal claim. That's a mathematical truth. It's a different CRT, which means that it's also a mathematical truth that if you accept this argument that the conspirators are going to reap their ill-gotten gains for every screen that they put into a finished good and sold to a direct purchaser.

They tell you, well, there's still going to be complex analysis, but no Court has said that where there's complex analysis you deny recovery to the direct purchaser. Every Court to consider the issues here where there's a direct purchaser of a product with component price fixing has gone in favor of finding that, yes, you are a direct purchaser with antitrust standing. And those are the decisions that Mr. Lehmann just went through with you Sugar/Linerboard, Judge Illston in the LCDs case and Judge Conti in this case on the motion to dismiss.

Mr. Kessler tries to distinguish Linerboard by saying no, it's -- and relies on the stipulation here to which we're to say, well, Linerboard alleged the finished

products conspiracy, and goes borrowing into the record below the third circuit to try to find that. Mr. Lehmann has explained why that's not correct because of the ellipsis. But you can read the third circuit decision and see that it does rely on a finished goods conspiracy.

It is following the Sugar line of analysis and endorsing it and applying it, such as Judge Illston has done and Judge Conti has done.

Now, in the cases the defendants are relying on direct purchasers are not being denied standing. Optical disk drive, Mr. Lehmann read to you the language from Judge Seaborg where he confirms that he agrees with Judge Conti and Judge Illston that plaintiffs in this case do not have a standing problem with respect to any ODD devices that they may have purchased directly from defendants. He was dealing with the purchases from non-defendants.

Illinois Brick, not at the intermediaries that Mr. Lehmann described.

UtiliCorp, the utilities purchased the natural gas, not the natural utility company.

Compressors, there the issue, as the Court said, was no named direct purchaser plaintiff has alleged and bought a finished product containing a compressor from a defendant or manufactured a compress and use those

compressors to manufacture that finished good.

Delaware Valley bundled products purchased from an independent third-party distributor.

And Stanislaus was purchases from non-parties to a horizontal conspiracy. The plaintiffs there tried to bring in as a direct purchase claim by going downstream and alleging a vertical conspirator. And the Court said no, that was not good enough to bring that claim.

If you accept this standing argument, you're not only going to be making new law; you're going to be reeking havoc in federal antitrust. This is a road map for a cartel. And this was the language from Sugar that Mr. Lehmann read to you.

It will allow the price fixer of a basic commodity to escape simply by incorporating the tainted element into another product. It can be 90 percent of the product, 80 percent of the product. There's no limits here. And it's a road map for a cartel to how to make profits. And if you wipe out the direct purchasers, well, we'll have deterrence for indirect purchasers.

Mr. Kessler says those are state law claims. Obviously not all state passed those. But you are taking federal law and federal deterrence out of the picture, which is directly contrary to the whole point of the direct purchaser rule of achieving deterrence and going

after and creating private attorney generals the direct purchasers to create deterrence against cartels, including international cartels.

This would do a severe blow to antitrust laws, which is why you're not seeing the Courts embrace it or endorse this principle.

It would be a ground-breaking ruling that would undermine this case that would create the conflict that you've expressed between this case and the LCDs case creating delays in the schedule of that case where our plaintiffs are also parties and creating the slow-down in cases that happen when you have intra-district conflicts going up to the Ninth Circuit, which would be the next step of the defendants.

It would be used to challenge the AUO verdict and the instructions there.

This is a severe thing that's being asked that doesn't have any authority behind it. And we think you should reject it and allow these cases to go forward.

HON. CHARLES LEGGE: Bear in mind with respect to your case, my recommendation that Judge Conti, whichever it will be, will contain to operative language doing anything to your case for you or against you whichever way it is. Now, I understand that you're concerned about what might be done in this case, its

impact on your case. I understand that. And that's why I'm listening to you. And accepting the caution of being careful what I do recommend with this should have some resident impact on the case. I accept that. Whether you're right or wrong, I'm not discussing the merits.

MR. ISAACSON: Right.

HON. CHARLES LEGGE: But I am not going to enter any recommendation that Judge Conti make any ruling on your cases as all. Okay.

MR. ISAACSON: Understood, your Honor. We take the presidential effect --

HON. CHARLES LEGGE: No, I understand that, and I appreciate your concern, and I appreciate --

MR. SAVERI: May it please the Court, your Honor, Rick Saveri. I'm going to be very brief. I'm just going to speak regarding the Rule 56(d) declaration that we submitted in support of the summary judgment.

I'll also try to speak up so the court reporter can hear me and the people at the other end of the hall and on the phone hear me.

Importantly, your Honor, the Rule 56(d) declaration sets forth the factual issues in dispute between the parties, the status of discovery of the action as it relates to the issues at hand, and the further discovery needed to be resolved pending before

your Honor. Importantly many of the cases cited to your Honor, and particularly the LCD opinion denying summary judgment for Toshiba, the same Toshiba in this case, the identical Toshiba companies in this case, and the issue before your Honor was decided after a full discovery and a complete record. It was not decided --

HON. CHARLES LEGGE: I'm sorry, which case is that?

MR. SAVERI: Let me give that to your Honor. That was the summary judgment decision that was decided --

HON. CHARLES LEGGE: In LCD?

MR. SAVERI: In LCD. And I'll give you that cite.

It was November 7, 2011, 2011 West Law 5357906.

And that was like your Honor has done here, there was a full schedule that was set up where there was then the discovery motions, expert reports, and then a full hearing after the whole discovery was done, and a complete record was made before your Honor.

Currently, as your Honor knows, discovery we have just begun. The defendants have just turned over roughly five million pages of documents, many of which are in foreign language. We are going through those and have yet to complete the review of those documents.

Just yesterday your Honor has ruled on the schedule in this matter setting forth the completion of fact discovery and the hearing and the discovery protocols for depositions. That has yet to be turned into an order by Judge Conti. So that's still pending to be an order.

Importantly, that relates to the pending summary judgment motion here your Honor. Plaintiffs served 30b(6) declarations on the defendants related to the issues needed to be decided. All of the defendants --

HON. CHARLES LEGGE: But the rule on this for or against, do I need any of that? Isn't it enough, isn't it enough that they've got in the record that these nine companies, I guess they are, never purchased CRT? Isn't that enough to rule for or against them on what Mr. Kessler --

Do I need any of this discovery?

MR. SAVERI: We feel that you do, your Honor, because a few of the facts that they put before you, for example, that we asked in these 30b(6)s were -- are the markets for CRTs and the televisions and the monitors --

HON. CHARLES LEGGE: If there is a bright light rule.

MR. ISAACSON: Right.

HON. CHARLES LEGGE: That purchaser of finished

product does not have standing to sue for the price-fixed product that is incorporated into it. If that's a rule of law, I don't need to analyze markets. I don't need to analyze complexity, although I think it's self-evident. But I don't have to do that.

MR. SAVERI: Well, your Honor, as far as exactly that, are they separate markets, there's no expert report on that.

HON. CHARLES LEGGE: I don't care.

MR. SAVERI: In fact, your Honor, there's not even a declaration that they sold product to the Dell, the Visio, or Sharp, or anybody they say is protectors --

HON. CHARLES LEGGE: I don't need that to rule on the motion, do I?

MR. SAVERI: Well, your Honor, we feel some of those issues are intertwined into the decisions.

HON. CHARLES LEGGE: They are in the rationale. I'll recognize they are in the rationale of some of the decisions. But I don't think I need that to rule on their motion.

MR. SAVERI: Fair enough, your Honor. We set that forth in our declaration. And so, like I said before, your Honor, the declaration set forth what we believe are those factual issues, and we presented those issues. We asked for 30b(6) of the defendants. They've

all been objected to. So that issue is in the declaration before your Honor.

Thank you, your Honor.

HON. CHARLES LEGGE: Thank you. All right, Mr. Kessler, do you want to take a few minutes break here?

MR. KESSLER: I will do whatever the Court would prefer. I could plow in or if the Court would --

HON. CHARLES LEGGE: Let's take ten minutes and maybe get it organized.

(Break taken.)

HON. CHARLES LEGGE: All right, back on the record.

Defendants rebuttal argument please, Mr. Kessler.

MR. KESSLER: Thank you, your Honor.

I want to start out that contrary to what was argued to your Honor, this Court would be the first to rule that there is no Illinois Brick standing for someone who did not purchase a price-fixed product and that it would not punch a major hole in antitrust jurisprudence and the world would not come to an end.

First of all, I am reading now from the Stanislaus case, September 3, 2010, decided in the Eastern District of California, I believe the world is

still standing. Plaintiff alleges the defendants conspired to fix the price of the raw materials for tin cans, not the product plaintiff purchases.

This, by the way, is on page -- this is on page 8 of the decision.

The Court then quotes Shamrock, the Ninth Circuit case in Shamrock.

Illinois Brick is inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediaries in the distribution change to fix the price at which the plaintiffs purchased, at which the plaintiffs purchased.

The Court then goes to say thus the products purchased by plaintiffs must be the subject of the price-fixing conspiracy.

Think how significant that ruling is for this case where we have a stipulation that the product purchased by these nine plaintiffs is not the subject of the price-fixing conspiracy.

And then it goes on to say, compare Shamrock Foods, plaintiff alleged the conspiracy was to fix the prices of the dairy products at the retail level.

By analogy the Court concludes if Stanislaus is the consumer, then plaintiff must allege there was a conspiracy to fix the price at the retail level, the

price at the tin cans.

No Illinois Brick standing. The world did not fall off its axis. That's what the Eastern District of California has stated. You would be joining the Eastern District of California in that ruling.

Next decision, the refrigerator compressors decision. And I'm now quoting -- this is on page -- what page is this? 658 of that decision, as follows --

HON. CHARLES LEGGE: I'm sorry, I forgot what Court that is.

MR. KESSLER: This is by the judge in the Eastern District of Michigan. Okay. And this was decided June 13, 2011.

And you remember, your Honor, this was a case where the plaintiffs only claim they purchased refrigerators, not the price-fix component which were compressors that go inside a refrigerator.

And they're discussing Linerboard. And this is what the Court said.

This case can be distinguished In re Linerboard in two important respects. First, although the Court did not focus on this, the plaintiffs in In re Linerboard alleged a conspiracy to fix both Linerboard, a component, and corrugated sheets, a finished product.

I'm noting that because it was stated by counsel

that we misrepresented Linerboard. I would submit we did not misrepresent Linerboard.

Further what the quote that plaintiffs' counsel read from Linerboard spoke about was a conspiracy to increase the price of the Linerboard for the purposes with the motive to increase the price of the finished product.

They are precluded from making that claim here. That's the conspiracy agreement that they argue to your Honor on the Rule 11 motion, which ultimately your Honor said that was no basis for, and then they stipulated they wouldn't allege it.

So they cannot allege here with this stipulation and ruling the conspiracy alleged in Linerboard.

And reading back in compressors, here the DP plaintiffs allege only a conspiracy to fix the price of compressors, which they claim had the ultimate effect of increasing prices for compressor products.

That is, the DP plaintiffs do not allege that defendants conspired to fix the price of finished products that contain compressors.

That, of course, as this case, has to be by stipulation. What does the judge go on to say. That is a fundamental difference because the plaintiffs in In re Linerboard allege that the defendants had conspired to

increase the price of corrugated sheets and that the plaintiffs were direct purchasers of the corrugated sheets.

So, again, the Court concludes that only the purchasers of the compressors can have standing.

That, your Honor, again, you would be joining this second court to rule this way with respect to that. So, again, this would not be unprecedented. This would not be causing the world to change.

It was mentioned this would somehow affect the government's case under LCD in the jury trial. The government does not sue under Section 4 of the Clayton Act. The government does not have to prove its right to damages. Whatever your Honor rules has no impact on the United States of America or any government case.

HON. CHARLES LEGGE: I understand.

MR. KESSLER: And this is what I want to get to. You know if this case is all about Section 4. If you read -- if you read Illinois Brick, what they end up saying and what they say again in UtiliCorp, is that we're not changing our ruling under Section 4 of the Clayton Act.

In fact, going back in UtiliCorp, okay, to that page we quoted before which was right before Roman four, it says having stated the rule in Hanover Shoe and adhere

to it in Illinois Brick, we stand by our interpretation of Section 4. That's what this is about.

Now, why is that significant? Well, we heard a lot of word games from plaintiffs' counsel. One thing was said was, well, these are direct purchases. So of course they have standing.

No, that's putting the rabbit in the hat.

The Illinois Brick question is are they direct purchases of the price-fixed product. There's no disputes. They did not purchase the price-fixed product. They purchased a television or they purchased a computer monitor, which means the only way to show Section 4 injury, it is impossible to show it without proving to what degree did the price of the television or the monitor reflect any conspiratorial -- alleged conspiratorial increase in the price of the CRT.

There's no dispute here, for example, that there are these separate entities affiliated companies they have. This is in their complaint. Your Honor know there's LPD which was a joint venture which they claim was affiliated with Phillips and with LG. There's MTPD who was affiliated with Panasonic and Toshiba. There are other affiliated entities, you know, involved here.

And the point is the direct purchasers here on the Illinois Brick are either the unrelated direct

purchasers like HP, Dell, Sony, Visio, et cetera, or they're the affiliated companies.

So what if -- which they claim, well, you should ignore that and go through it.

The point here is under no circumstances are these particular plaintiffs direct purchases of the price-fixed product.

So what they want your Honor to do is to create a new exception for that group, saying it will help antitrust deterrence.

We would respectfully suggest the Supreme Court and the Ninth Circuit has said the Courts are not in that business of going through one by one and deciding is this good for deterrence or bad for deterrence, is it good for -- is it easy to prove pass-on or not easy to prove pass-on. That's what's been taken away.

We heard arguments, well, what if it's 50 percent of the product? What if it's a big product? What if it's 80 percent affiliated?

Those are all issues of how easy or difficult it is to prove pass-on. That's all. It's always pass-on.

I heard it said, well, you don't have to prove pass-on if it's the same company. Of course you have to prove pass-on. If it's a different product, which they can't dispute, so a television, let's say, costs X.

Okay. A $700 television. And a CRT costs, pick your price, they want to use 50 percent, say it's a $350 CRT. And let's say the allegation is the price was increased ten percent, $35.

Okay. This doesn't matter because it doesn't matter what the numbers are. The point is to satisfy Section 4 they'd have to say how much of any of that $35 made its way into the price of the television, and what the Supreme Court said is we can't do that, as opposed to the economist theoretical models in the real world trying to litigate case by case how much of that was -- affected the price. Whether it went there is not in the federal antitrust law is what we want to do.

Now in indirect cases some states, whatever the states are have said we do want to do that. That's okay. That's the policy of those states. But in the federal context it's been directed.

I want to come back to Judge Conti's opinion because they spent a lot of time arguing Judge Conti decided that.

In all due respect, I think this is completely wrong. Here is what Judge Conti said about this issue in the context.

First of all, his discussion to start under F antitrust standing, and he says -- he starts out solely

with the discussion of AGC standing, nothing about Illinois Brick at all. If you look at the context that's leading this, he says the special master recognizes -- recommends denial of the motion to dismiss based on supposed lack of standing, and then he sites the AGC factors. No mention of Illinois Brick in that paragraph.

Then after discussing AGC he says the following. The first sentence is critical.

Here the direct purchase plaintiffs allege they purchased CRTs or CRT products from defendants or their subsidiaries at inflated prices due to defendants' unlawful conduct citing the direct complaint.

Well, if you look at those paragraphs of the direct complaint, you'll find this is where the conspiracies alleged regarding not just CRTs but also CRT products. And that's what he's dealing with here. We also know that because in your Honor's recommendation decision, which is what he's basing this on, and this is page 18 of the printed version of your Honor's decision, says the following.

He says -- he says defenders move to dismiss based upon an argument of plaintiffs supposed lack of standing. However that argument is based in turn upon defendant's perception that the complaints allege a price-fixing conspiracy only as the CRTs. And the

special master interprets the complaints as alleging a conspiracy as to CRT products as well.

That's what was presented to judge -- to Judge Conti. And it's in that context when he says this is the type of injury the antitrust laws were attended to address, and, yes, he does cite Linerboard, but without any discussion at all about any of the issues we're discussing now.

He then goes on for the first time to mention Illinois Brick in the next paragraph, and only does that for the indirects saying Illinois Brick's been repealed. There's absolutely no discussion of the relationship between Illinois Brick and Linerboard or anything else.

So for them to say this is a ruling by Judge Conti in light of your Honor's recommendation, in light of the fact that the conspiracy involved both in this language, I would suggest, your Honor, is simply not correct. I would also note that --

Well, that's my point about Judge Conti's decision.

The next thing I want to mention is they spoke about ODDs. What happened in ODDs is Judge Seaborg was dealing with a conspiracy to fix the price of both ODDs and ODD devices. He says that repeatedly. ODD devices are the equivalent of CRT products.

Okay. It is true he was particularly skeptical of the conspiracy that involved third parties like HP and Dell, and he granted a Cromley (phonetic) motion based on that. But he independently said they're alleging a conspiracy regarding both the products and the finished products which is the only reason why he suggested they might have standing for the ODD devices if they purchased it because there was a conspiracy alleged with respect to that.

It's very much like your Honor's original recommendation decision.

And when he goes on to say is that, but I don't see in any event how there could be a conspiracy involving HP and Dell and others who were victims. Totally separate issue in the case.

On the issue that's on point he says nothing inconsistent with the motion we're making. In fact, he's very consistent with the motion he's making because he ends up saying you must allege a conspiracy that you bought the ODDs. That's his bottom line with regard to that.

And, again, as I said, they pled their case, and that's now before him. But there's no way that decision is inconsistent on that point.

Next point here is Hanover Shoe, Illinois Brick,

Delaware Valley, UtiliCorp. I have no doubt that if your honor looks at those decisions, you will come to the conclusion that contrary to what's been argued, that the complexity of proving Section 4 pass-on is -- was the primary consideration that motivated each of those decisions. In fact, it is specifically noted in UtiliCorp that that argument, not deterrence, was the first concern of Hanover Shoe and Illinois Brick. Your Honor will see that. That was the major concern in those cases.

Plaintiffs conceded, conceded that the line of cases here which involve --

Lost my train of thought for a second.

The line of cases here based on the controlled subsidiary exception involved the same product, not, you know, not a transformed product, not a different product. It does not matter, as your Honor said, how much it's transformed. It does not matter, as your Honor said, how different the markets are. It's the mere fact that it's a different product, in a different market. Whatever it may be, is that alone enough where they didn't purchase the price-fixed product as a matter of law to say there isn't standing. There's no factual issue regarding any of that here.

This will not have any impact on LCD. LCD

obviously has its own rulings. Okay. They will presumably be appealed and not appealed to the Ninth Circuit. They're either wrong or right. What your Honor does I don't think is going to have any impact on Judge Illston anymore, frankly, your Honor, than I hope Judge Illston's decision has any impact on your Honor.

I think you're both going to independently decide what you believe is correct, and then ultimately the Ninth Circuit may be the one who either decides it in LCD or here.

What I am very comfortable about is that the governing Ninth Circuit will in Delaware Valley in the Supreme Court indicate that where these issues must be proven, and there's no way again for plaintiffs to avoid this by saying, well, they're direct purchasers. They're not direct purchasers of the price-fixed product. There's no way for them to say they don't have to prove pass-on because the argument they make as well is not vertically different.

Frankly, your Honor, it is more difficult to go from one market to another where other companies are not conspiring in terms of the complexity of proof than it is to go down the distribution chain. That's why we cited the umbrella price-fixing cases. In other words, the complexities are each more profound of trying to figure

out what was passed on in the television or refrigerator or in ODD device or in a tin can, that's what those cases stand for, than it would be just by going up and down on a distribution chain issue.

So the fact that it's not vertical, that their problems are horizontal complexity, because it's a different product in a different market, makes this worse from a Clayton Act Section 4 standing standpoint.

Finally, your Honor, I want to come back to the questions that your Honor asked at the very beginning.

First, we're looking for a narrow ruling on a narrow issue based on this stipulation which does not allow them to allege a conspiracy with a motive to fix the prices of the finished products and which there's no dispute we heard from counsel that these nine plaintiffs did not purchase CRTs, that there's no dispute they are different products in different markets, whatever those differences may be, and there's no dispute as, plaintiffs' counsel argue, they don't deny this, that the impact could vary. In that narrow set of cases and circumstances, we believe Section 4 of the Clayton Act would require them to prove things which Illinois Brick, Delaware Valley, UtiliCorp all say is not for the federal courts. And whatever deterrence needs to be done here will be provided by the HP, Dells, Sonys of the world, by

the United States government, which was not affected by this, by the indirect case that may to decide to include the purchases in indirect.

In fact, the fact that of the indirects decided not to include these purchases in their definition of indirect is pure happenstance. If your honor were to rule that we -- that they can be included in direct case, that would not preclude another plaintiffs' counsel from coming in and saying they're indirect too.

In other words, the mere fact that there seems to be an understanding between counsel on this side does not eliminate this problem. It seems to me either they're direct or they're indirect under federal law. You know, it's not that you could avoid the issue simply because the indirect plaintiffs' counsel here have now tried to pick a fight, if you will, with the direct plaintiffs as to what's there. That wouldn't protect us from another suit from somebody else saying I've got these indirect plaintiffs.

So the question is someone has to decide. They're in one box or the other. We would respectfully submit, because they must prove impact on another product in another market, they are at best indirect.

Unless your Honor has any other questions, I think I've covered what I need to do.

HON. CHARLES LEGGE: Well, I'd like to return back to this stipulated order.

MR. KESSLER: Yes.

HON. CHARLES LEGGE: Tell me what you think the significance of the provisions' portion of that paragraph three is.

MR. KESSLER: Okay. Let me just get that out in front of me.

Paragraph three. Okay. I believe that what this means is that this was an acknowledgement that by dropping the claim of a conspiracy, which is what this does, they withdraw their -- their claim of a conspiracy encompassing finished products. That's what they dropped. So they can't --

So, first of all, they can't allege, as they said was alleged in Linerboard, that there's a conspiracy to fix CRTs for the purpose of increasing the price of television or monitors. They're precluded from that. This then said provided that this was not resolving the issue, that the issue or possible impact remained in the case. And in our view it remains in the case in the following way.

If we are right, the Supreme Court says it's in the case but they are not direct purchasers, at least with respect to Section 4.

By the way, they could possibly allege a Section 16 injunctive relief claim, which as your Honor knows is not bound the same way. That's not an Illinois Brick issue. So it may remain in the case with respect to Section 16 anyway with respect to that.

But with respect to Section 4 of the Clayton Act, if we're right, they're precluded from trying to move that. If we're wrong, it remains in the case because they now have to go forward and try to prove that impact plaintiff by plaintiff. Or if it's a class, on a class-wide basis with respect to that, which makes them, by the way, look exactly like who? It makes them look exactly like the indirect plaintiffs. So that even --

what they're saying they're entitled to try to prove it under the step. If we're wrong in Illinois Brick, it puts them right in the indirect category because they'd have to prove the impact or effect on the prices of finished products.

Now, we believe on the pure legal issue, under Section 4 they can't allege Section 4 standing with respect to that. If they are right, it would continue, but it'd make them exactly the same as the indirects, which is why I said they've got to in one bucket or the other.

So basically, your Honor, I believe what this

stip does is it leaves this issue now for your Honor to resolve whether as a matter of law they can seek to prove this impact or whether Illinois Brick precludes it or whether they --

HON. CHARLES LEGGE: You don't think that language entitles them to go through discovery, go to summary judgment, go to trial on the impact issue?

MR. KESSLER: Absolutely not, your Honor. Because we did not change by this stipulation either what the Illinois Brick rule is or is not. And, in fact, even if we're wrong about Illinois Brick, they would still have to, under Section 4, raise a genuine issue of material fact on the impact or they couldn't go to file on summary judgment.

In other words, there's two steps to this analysis which clearly the stipulation did not change.

One is can they -- as a matter of law can they prove Section 4 injury not being direct purchasers, which this step didn't address at all. And, No. 2, if they can, as a matter of law, pursue it, they'd still have to raise a general issue of material fact to go to trial even on the impact issue. And we got there.

So this step doesn't change either of those points.

MR. SIMON: Your Honor, I wasn't going to speak

today, but what Mr. Kessler is saying right now is totally revisionist history.

I stood I think this in very spot, and I was arguing at one of the hearings, and Mr. Kessler pointed to me and said, Mr. Simon, do you stipulate that fact that impact can remain in this case.

And he said it in the middle of my argument.

He also said at the May 26, 2011, hearing exactly what Lehmann said to you. "In LCD they argued impact, okay, and they argue that under the Sugar Linerboard cases. They have standing to sue for that. Okay. If they were doing that here, I wouldn't have this motion. Okay. So they should be doing, asserting what they asserting in LCD."

That's exactly what the stipulation was negotiated and intended to be. And Mr. Kessler is now running away from it, and he's running away from it because he wants it to suit his argument here today.

If you accept his argument, it takes entirely the entire history of this case out of that stipulation. He's reading it out just like he wants to read out Hanover Shoe and Royal Printing and everything else. It's actually revisionist history.

MR. KESSLER: Your Honor, if I may respond since Mr. Simon came into my argument.

First of all, what he is quoting when I said we wouldn't be here making this motion here today was we wouldn't be making the Rule 11 motion. What that argument was about had nothing to do with the subsequent negotiation of this stip, in all due respect to Mr. Simon.

During the Rule 11 motion, okay, which your Honor recalls was quite contentious, what we said is had they been making the argument in LCD under Sugar and Linerboard, we would not have brought a Rule 11 motion. And that is a hundred percent correct.

The Rule 11 motion was solely based on the lack of any objective basis for alleging a conspiracy on the finished products. That's what was discussed in that hearing. That's what was discussed about will you stipulate to that. It had nothing to do with this.

After that hearing, your Honor ruled and granted, made a recommendation on Rule 11.

Subsequent to that, we negotiated a stip to vacate the Rule 11 sections and to do this stip. And this stip, I am happy has an officer of the court, had nothing to do with Illinois Brick one way or the other. It neither required them to agree with our argument or required us to not agree or required us to agree with their argument.

It had nothing to do with Illinois Brick, which we now are arguing to the Court.

In fact, your Honor will remember, and this I'm quite sure, okay, in the argument for Rule 11, we said what are the reasons to consider that motion now was because it could lead to issues like who's in the class, who's not in class, who is direct, who's not indirect. In fact, your Honor noted that in your Honor's opinion on the Rule 11 that this could have significance with respect to other issues in the case.

Well, now it has significance with respect to other issues in the case because it's clear if they were alleging a conspiracy of finished products, then we couldn't make this Illinois Brick argument because then we would have been -- they would be direct purchasers of the product that was there.

So, again, with all due respect to Mr. Simon, he's conflating what was going on during the Rule 11 in this stip, and I'm not arguing this stip precludes them from taking this position. Quite the contrary, I want to be clear. The stip has nothing to do with this argument one way or the other except to the extent it precludes them making the conspiracy claim. It has great significance on that point of the argument, but it doesn't preclude them from --

HON. CHARLES LEGGE: Whether the stipulation precluded you from making any contention other than they can go ahead all the way with their case --

MR. KESSLER: And I would say, your Honor, that was the intention of this. It would have said something like parties hereby will not make any argument that Sugar and Linerboard is not the law and would that said it won't make any Illinois Brick argument that there's no way to read that into that particular language.

HON. CHARLES LEGGE: What you're really saying is the thing was flowing along.

MR. KESSLER: Yes.

HON. CHARLES LEGGE: You took one rock out of the river bed, which was the issue of is there -- are we concerned with the conspiracy of the finished product and just simply leave the rest to flow along as it will.

MR. KESSLER: That's correct. And they wanted -- the reason for that language, to make it clear, is that they were not precluded from arguing this. But it wasn't to make it clear that we were precluded from that, that we were waiving Illinois Brick. That would make no sense in the language of this stip.

I don't think anyone waived anything other than the conspiracy point.

MR. GUIDO SAVERI: Your Honor, I've been quiet.

HON. CHARLES LEGGE: I was wondering, Mr. Saveri. It's been two hours 25 minutes and you haven't said a word.

MR. GUIDO SAVERI: Your Honor, the record speaks for itself. I think the position that Mr. Lehmann made, this is a -- it's a simple issue. There's no doubt that what Mr. Kessler is saying is incorrect. He doesn't have standing.

The position that we took that we do have the right to go forward in spite of the fact that our nine day plaintiffs only bought the finished product.

I think the feel that I feel maybe surprised that I think that Mr. Kessler, with all due respect to Mr. Kessler, and although we fight back and forth, we're relatively good friend. I just --

HON. CHARLES LEGGE: Comes now the but.

MR. GUIDO SAVERI: He's making all that money that he's making on representing the National Football League, and I told him this morning that my office when I was with Joe Allioto was responsible under the Radovich case, to have football under the antitrust laws rather than the rules that applies to baseball.

HON. CHARLES LEGGE: Will you take him out to continue dinner please?

MR. KESSLER: You know what, I told him I

thanked him for that and maybe dinner is a good idea.

MR. GUIDO SAVERI: But the point is he's reneging, he's reneging on the stipulation that we made in connection with the Rule 11 motion.

The stipulation, as Mr. Simon said, was exactly the reason we entered into that stipulation. We could have denied that, taken an appeal on the ruling and everything else. The purpose of that stipulation was as is specifically written into it, that the issue of the finished product and the effect that the price fix on the -- on the tube, the price fix on the tube had an effect on the finished product, and that based on that stipulation, the agreement was that we would be permitted to show that the price fix on the tube had an effect just like LCD on a finished product.

That is why we entered into the stipulation, and it surprises me to hear of the position of Mr. Kessler. He's taken that position because he is stuck with the stipulation that he suggested, and specifically when he threw it at Mr. Simon time and time and again and at me, why don't you do what was done in LCD. Why don't you do what you're doing in LCD. Why don't you do what you're doing in LCD. We did. And he ought to live by it. And the stipulation that we entered into is exactly what the law is and what it permits us to

do.

He is knocking the antitrust law back a million years. That he has to argue that because he put himself in a position that now he wants to renig from.

The position that we took in this case is absolutely right. If you listen to his arguments, you'll knock out all the law.

MR. SIMMONS: Mr. Kessler's clients aren't the only one that signed the stipulation.

HON. CHARLES LEGGE: No, I understand.

MR. SIMMONS: I think Mr. Kessler put it very succinctly.

Nothing in that stipulation precludes the Court from considering the motion that has been brought before it. What it does require is that if that motion is denied, if we lose, that the plaintiffs have to put to their burden of maintaining their status of direct purchasers by showing that there was an impact on the alleged price-fixed -- from the alleged price-fixed product, the tubes, into the product that they didn't purchase and for which there is no price-fixing conspiracy, the finished products. That's what the stipulation says.

They're not relieved of that burden if they're permitted to go forward, but there's no -- we've had no

understanding to the contrary. The notion that anyone is reneging on the stipulation is simply, with all due respect, that is revisionist --

MR. KESSLER: Your Honor, I have great fondness and respect for Mr. Saveri, and everyone on the plaintiffs' side. I have a 25-page brief filed in opposition to our motion. Nowhere in the 25 -- this is their brief. And nowhere in the 25 pages did they make what they now believe is this preclusive argument that the stipulation precludes this motion.

One would think --

HON. CHARLES LEGGE: Maybe I invited it by asking the question.

MR. KESSLER: One would think if that was the clear understanding the way they make it, that somewhere in these 25 pages they could have squeezed that argument in. I would suggest, your Honor, that wasn't the understanding. What we did was we left this issue for the Courts to decide, which is where we are.

MR. GUIDO SAVERI: I just want to say, one minute, aside from the stipulation which I think he should live by, the position we made today we are right on the law. Aside from the stipulation, even if there were no stipulation, which he should live by, we are right on the position that we made that we have stated

what the law is and what the Court should follow.

MR. SIMON: The stipulation all allows us to do discovery on the very issue he's saying shouldn't be in the case for which it's purely a legal issue and not a factual issue.

We would never have end into agreement to do discovery on that issue unless as we say as opposed to what Mr. Kessler says.

MR. GUIDO SAVERI: And, technically speaking, in relation to the comment just made down there, should there be a ruling that a finished product is not involved in the case, Toshiba is still in the case, in the LCD case. And if there's a ruling in this case to the contrary, there's nothing to prevent Toshiba to going to Judge Illston and saying there's a contrary decision in CRT right on the button. Because Toshiba is still in both cases.

And so there be would a ruling, which it would be wrong, respectfully, your Honor. They would cite that decision, and they would go in Monday because it's the LCD case is set to be tried on April 23. So they'll go in with a ruling and say that judge issued a ruling exactly contrary to yours.

I respectfully submit that our position is correct, but that's what could happen and would happen.

HON. CHARLES LEGGE: All right. The motion will stand submitted.

MR. ALLIOTO: Your Honor, I beg your pardon. This is Mario Allioto on behalf of the indirect purchasers. May I be heard? I know you've heard a lot of argument, and I want to make a few points.

There was some suggestion today that there is just a labeling problem or a realignment problem, that if the direct purchasers' claims are knocked out, that they would simply be thrown into the indirect purchaser bucket. I think that was the phrase that was used, "the indirect purchaser bucket."

HON. CHARLES LEGGE: And you're the bucket bearer?

MR. ALLIOTO: Yes.

There is an indirect purchaser bucket, and it's a bucket that alleges a class on behalf of end users of CRT products. End users. That has nothing to do with the class that is being alleged by these, we'll call them for the time being, direct purchasers.

HON. CHARLES LEGGE: Are you picking up that, are you picking that language up out of your consolidated complaint?

MR. ALLIOTO: Yes, your Honor.

HON. CHARLES LEGGE: I don't have it in front of

me, and I've forgotten the language.

MR. ALLIOTO: We will see to it that you've got it.

HON. CHARLES LEGGE: I've got it. It's in my cubicle. I've got it. But I wanted to make sure where you were getting that language. That's from your own complaint?

MR. ALLIOTO: From the most recent operative complaint. It would have been end user complaint.

And that is very important because this group, this direct group has completely different claim. They're not subsumed within our class. They would have to -- I don't know what would happen, but they would, I assume, would have to realign claims under the state law. And let me just say what the effect of that would be. It would drastically reduce their case because, as your Honor knows, under the state law not every thing has an indirect purchaser statute.

HON. CHARLES LEGGE: I'm aware of the economic impact on the case.

MR. ALLIOTO: Okay. Well, that is, I would go so far as to say I don't even know if there would be a case. But I'll leave that to other --

HON. CHARLES LEGGE: What you're telling me -- I think what you're telling me is that were I to agree with

the defendants, it wouldn't be automatically that they'd suddenly fall into your group and proceed ahead with your case because you are now proceeding with it.

MR. ALLIOTO: Yes, it would be automatic that they would not fall into my group.

HON. CHARLES LEGGE: Okay. Okay. I understand what you're saying.

MR. ALLIOTO: That is the point, your Honor.

HON. CHARLES LEGGE: I understand.

MR. ALLIOTO: That is the only point.

I appreciate you hearing me out. Thank you.

HON. CHARLES LEGGE: By the way, I got your letter yesterday about the matter of the translations, and I'll go back and take another look at that. Okay.

MR. ALLIOTO: Thank you, your Honor.

HON. CHARLES LEGGE: We'll recess then. I'm signing off on the telephone.

(Hearing concluded at 12:54 p.m.)

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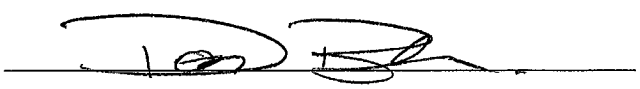

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